FILE COPY

No. 205

IN THE

Supreme Court of the United States

October Term, 1958

HELEN M. KRAUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on May 8, 1958 (A 115).

OPINIONS BELOW

The Judge of the United States District Court for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia is set forth at pages 113 and 114 of the record.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 8th, 1958 (A 115). This petition for certiorari is filed within ninety days from the date of the said judgment pursuant to the provisions of Title 28 U.S.C. 2101(c).

QUESTIONS INVOLVED ON APPEAL

The question in this case is whether George N. Herbert committed fraud in the reinstatement of his National Service Life Insurance policy.

STATEMENT OF THE FACTS

This was a suit brought by Helen M. Kiefer on the National Service Life Insurance policy of her late brother George N. Herbert. In order that this Court may fully understand the true facts in the case, a full and complete statement must be made. While in the Military service of the United States, George N. Herbert applied for, and was granted, National Service Life Insurance in the amount of $10,000, and paid premiums until the date of his discharge in January, 1946. On October 3, 1946 he applied for reinstatement of only $5000 of this insurance on which premiums were paid to include August, 1947. On April 26, 1948 he reinstated $5000 of the insurance which had lapsed, and paid premiums through November, 1951. Premiums on the last reinstatement were deducted from his compensation payments from the Veterans Administration. It is this last reinstatement that the government claims was reinstated by fraud.

George N. Herbert was a war casualty in that he was awarded, and paid, compensation by the Veterans Administration for a disability of asthma for which he was rated 60% disabled. Because his disability was incurred in the service, he was entitled to reinstate his insurance at any time prior to January 1, 1950 if his service-connected

disability was less than total under provisions of Section 802(c) (2) of Title 38 of the United States Code. The Courts below took the viewpoint that the reinstatement was on a comparative health basis in which they are clearly in error.

In the application for the reinstatement the insured stated that he had applied for compensation, and gave his compensation number in the Veterans Administration. The defense of fraud is entirely predicated upon the medical reports contained in the files to which the insured referred when he made out the application for reinstatement. These medical reports were examinations by governmental physicians, and it is admitted that they were all contained in his file in the Veterans Administration. The defense of fraud is entirely predicated upon the medical reports admitted to be in the possession of the Veterans Administration at the time that the reinstatement was effected. Furthermore, the officials of the Veterans Administration knew that he had been examined by their physicians because the premiums were deducted from his compensation payments.

At the first trial Judge Alexander Holtzoff sustained the motion of the petitioner for a summary judgment based upon the fact that the Veterans Administration was bound to take notice of their own files, and in so doing followed the decisions at that time which so held.

The Court of Appeals below reversed the judgment. A petition for certiorari was filed in this Court because of the clear conflict between the decisions of the Ninth Circuit, and the Seventh Circuit, and the decision of the Court of Appeals below. This Court failed to enforce its own rules, and the petition was denied.

This case then went to the United States District Court, and a trial before a jury, Judge Letts presiding. At the conclusion of all of the evidence the petitioner, and the respondent, both moved for a directed verdict. The Court

sustained the motion of the respondent, and the petitioner appealed.

The Court of Appeals rendered a per curiam opinion not deciding any of the questions of law raised by the petitioner, and citing no authorities in support of its decision obviously upon the ground that there were no precedents that could be cited in support of its judgment. The points relied upon by the petitioner will be discussed fully in the reasons for granting the writ.

SPECIFICATIONS OF ERRORS TO BE URGED

The petition will urge that the decision of the United States Court of Appeals for the District of Columbia in this cause conflicts with decisions of this Court and other decisions of the United States Courts of Appeals. That the decision of the Court of Appeals conflicts with the decision of this Court in the case of Pence v U. S. 316 U.S. 332, on the grounds that the undisputed facts in the case show that fraud had not been committed because all of the elements necessary to constitute fraud were not proven by respondent in the District Court and that in fact, the evidence in this regard was so lacking that the United States District Court should have directed a verdict in favor of the petitioner. The petitioner will further urge that exhibits offered by the petitioner, namely, the death certificate of the insured (A 13) (plaintiff's exhibits 2, 3, 4, 5 and 6) (A 14, 15) which were rejected by the District Court should have been admitted in evidence as bearing upon the question of whether the insured knew that he was suffering from any disease other than bronchial asthma.

The petitioner will also further urge that if there was any proof as to a fraud perpetrated by the insured, that the issue of fact was for the jury and not for the Court.

The petitioner will also urge that this Court reconsider the question of whether the Veterans Administra-

tion had constructive knowledge of the medical reports contained in its own files and to which the insured referred in his application of reinstatement of his insurance. The conflict of the several United States Courts of Appeals of the different circuits on this question falls squarely within the rules of this Court setting forth the reasons for granting a petition for certiorari.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should issue in this case pursuant to Rule 19 (1) (b) of this Court, in that the Court of Appeals below has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and has decided a federal question in conflict with the applicable decisions of this Court.

The petitioner seeks to raise by this petition for certiorari four questions. First, that the evidence as to the fraud in the reinstatement of the National Service Life Insurance contract does not meet the requirements of the decisions of this Court as to what constitutes fraud. Second, that the District Court erred in directing a verdict for the respondent because if there was any issue of fraud the question of fact in this regard should have been submitted to the jury. Third, that the District Court erred in rejecting the exhibits offered by the petitioner at the trial which consisted of the death certificate, and the medical reports of the insured, all of which were clearly admissible bearing on the question of the intent of the insured in obtaining reinstatement of the National Service Life Insurance policy sued upon. All of these questions were properly raised, and submitted to the Court of Appeals below who did not pass upon any of them, and completely ignored the contentions of the petitioner. Fourth, the petitioner hopes that this Court will also consider the question of whether the Veterans Administration were not required to take notice of the files of the insured

which contained the medical reports by government doctors relied upon for the alleged fraud in the reinstatement of the policy sued upon. This for the reason that on the application for reinstatement the insured specifically referred to this file.

This Court, in the case of Pence v United States, 316 U.S. 332, 86 L.Ed. 1510, and cases cited in the opinion, laid down the rule as to what constitutes fraud in the reinstatement of an insurance policy. At page 338 of the U. S. report, this Court stated that in order to constitute such fraud there must be proof of five things. The elements necessary to prove fraud must show the following:

1. A false representation.
2. In reference to a material fact.
3. Made with knowledge of its falsity.
4. And with intent to deceive.
5. With action taken in reliance upon the representation.

This rule announced in the Pence case, supra, has long since been the rule laid by this Court:

Claflin v Commonwealth Ins. Co., 110 U.S. 81, 28 L.Ed. 76

Lehigh Zinc & I. Co. v Bamford, 150 U.S. 665, 673, 37 L.Ed. 1215

Mutual Life Ins. Co. v Hilton-Green, 241 U.S. 613, 60 L.Ed. 1202

In two opinions of the Solicitor of the Veterans Administration on the question of fraud in the reinstatement of a government insurance policy the Solicitor cited the opinion of this Court in the case of Claflin v Commonwealth Insurance Company, supra, that all five elements were necessary to constitute fraud.

Re: John Frank Vondrak N-12, 192, 524, dated March 24, 1948.

Re: Frank F. Short C-7, 488, 629, N. 3 291 355 dated April 28, 1948.

Therefore it seems that there can be no dispute as to what facts are necessary to constitute fraud in the reinstatement of a National Service Life Insurance policy.

The Court of Appeals in deciding this case below, and indeed the District Court in directing a verdict for the respondent, ignored the decisions of this Court as to what constituted fraud.

Assuming for the moment that the question No. 9 on the form (A 9) as to treatment applied to examinations of government doctors as well as to private physicians then the proof of fraud meets the first element as outlined herein as a false representation, and it would also meet the second requirement in reference to a material fact. But this is as far as the proof of fraud goes to the reinstatement of the policy in question. It does not meet the requirements of number 3 "made with knowledge of its falsity", nor the requirement of number 4 "and with intent to deceive".

The fraud which is charged is the failure to state that the insured had been examined by government doctors whose reports were all contained in the insured's file in the Veterans Administration. There is a total absence of any evidence showing "an intent to deceive" the important element of the alleged fraud.

Herbert, the insured, was suffering from asthma which was service-connected, and he was entitled to reinstate his insurance at any time before January 1, 1950, unless he was totally disabled from his service-connected disability. He did not have to be in the same health as he was on the date of the lapse of his insurance if he was less than totally disabled at the time of the reinstatement.

Title 38 Section 802(c) (2)

The above quoted section provides for the reinstatement of insurance of service men and women who were suffering from service-connected disabilities and who were less

than totally disabled at any time prior to January 1, 1950. It is undisputed that Herbert, the insured in this case, was never rated totally disabled, but on the date of the reinstatement was 60% disabled from asthma. The Veterans Administration knew this because the premiums paid on the reinstated policy were deducted from his compensation payments. The answer filed on behalf of the respondent admits this. (Par. 2 of answer A. 4).

The one element of fraud upon which there was no proof submitted by the respondent is number 4 "And with intent to deceive". Fraud is predicated upon the ground that one of the medical reports made by governmental doctors indicated that in addition to the disability of asthma the insured was suffering from cirrhosis of the liver. If these medical reports relied upon by the respondent showed a condition only of asthma for which the insured had service connection, there could not possibly be any fraud in the case. He is charged with having knowledge that he was also suffering from cirrhosis of the liver. But there is no evidence in the case that Herbert ever knew that he had this disability. The evidence is to the contrary. The respondent's own medical witness testified (A 25) he was not told what they had found upon their examinations. Testimony further offered showed that persons may be suffering from cirrhosis of the liver and not know that they have the disability.

The death certificate offered in evidence but rejected by the Court (A 13) showed that cirrhosis of the liver existed only "for months". The death certificate shows that the insured died on November 20, 1951, over three years and some seven months after the reinstatement of the policy in question on April 26, 1948.

The insured, Herbert, gave his correct C-number of his claim in the Veterans Administration for compensation in which the medical reports in question were filed. This, of itself, shows that there was no intent on the part of the insured to deceive.

It had long since been the practise of the Veterans Administration where an application for reinstatement of insurance was received which contained a C-number that the office forwarding the application should review the compensation file. This order was issued as early as June 9, 1926 (Circular No. 367 Adjudication Service). In Circular No. 419 Medical Service issued March 30, 1927 it was provided that in any case where a person applied for the reinstatement of his government insurance there should be a search to ascertain the existence or non-existence of a claims file.

The form for the reinstatement of insurance used by the insured in this case was the form first adopted by the Veterans Administration, and contained the question as to whether the applicant had applied for compensation and to give the C-number for the very express purpose of carrying out the orders as to searching the compensation folders in insurance cases. The Veterans Administration has now at this late date changed the form for reinstatement of insurance leaving out the question as to compensation.

According to the opinion of the Court below, the question relative to compensation, and the giving of the compensation claim's file number served no useful purpose. The fact is that they were definitely asked to comply with the orders regarding the information desired in reinstatement cases and it is little short of ridiculous to make any other contention.

Furthermore, how could there be any intent to deceive when the insured pointed out to the officials of the Veterans Administration the very file which contained the medical reports made by their own staff which included the facts upon which they rely to constitute the fraud in this case.

Since the decision of the Court of Appeals below affirming the judgment of the District Court is in direct conflict with the decisions of this Court on this ground alone, this petition for certiorari should be granted.

The second ground upon which this petition for certiorari is predicated is that the District Court erred in directing a verdict for the respondent. The issue, if any, was one of fact, and the District Court should have submitted the case to the jury.

In this connection the decision of the Court of Appeals below conflicts with the decision of the Eighth Circuit Court of Appeals in the case of Jones v United States, 112 F.2d 282 in which the Court of Appeals held that the issue of fraud should have been submitted to the jury. See also the case of Bailey v United States, 92 F.2d 456 where the Court of Appeals held that the issue of fraud was for the jury. The proof of fraud in both of these cases was much stronger than the evidence submitted by the respondent in this case.

The petitioner also asserts that the District Court clearly erred in refusing to admit in evidence the death certificate which showed that the disability of cirrhosis existed only for "months" prior to death. This had a bearing on whether the insured knew he was suffering from this disability some three years and seven months prior thereto. Also the District Court erred in refusing to permit the introduction in evidence of exhibits petitioner's exhibits Nos. 2, 3, 4, 5 which showed that the only treatment which the insured received in May, June and July, 1949 was for his disability of asthma. All of these exhibits had a bearing on what knowledge the insured had that he was suffering from the disability of cirrhosis and whether there was any intent to deceive at the time he applied for reinstatement.

Lastly the petitioner again raises the question of the conflict of the United States Court of Appeals on the question of placing on the application for reinstatement the claim number of the insured's compensation claim in

his file. Two Courts of Appeals have held that this constituted a notice to the Veterans Administration.

United States v Kelley, 136 F.2d 823, 9th CCA
Clohesy v United States, 199 F.2d 475, 7th CCA

Please refer to the opinion of the Distinguished Jurist Youngdahl, formerly Governor of Minnesota, in the case of Thompson v United States, 109 Fed. Supp. 283 construing these cases. The decisions in these cases cannot be reconciled with the decision of the Court of Appeals below in this case, and expressly their prior decision. It may now be contended that the Insurance Division of the Veterans Administration is separate and apart from the compensation section that it cannot have any knowledge of what is contained in a compensation file. This statement, if made, would be utterly false and particularly in this case where the insurance premiums were deducted from the insured's compensation. The compensation file had to be examined in order to determine if premiums could be deducted from the payments of compensation made to the insured.

CONCLUSION

In some thirty-five years of experience in litigation on government insurance policies, thirteen years of which was with the government in which counsel's time was entirely devoted to suits on insurance contracts, and during which time counsel tried these suits in some forty United States District Courts, and briefed and argued these cases in all of the eleven Circuit Courts of Appeals, I have never seen or found any case where the Courts have totally ignored the decisions of this Court, as to what constitutes fraud or have failed to properly evaluate the evidence as to what constitutes fraud. The decision of the Court of Appeals stands out alone as establishing a new rule of law that it is not necessary to show any proof as to the intent

of the insured but that fraud alone may be predicated upon a wrong answer to a question asked when the answers to the other questions such as giving the compensation number clearly show that there was never any intent to deceive. The medical reports relied upon for the fraud being contained in the file specifically referred to in the application for reinstatement. The decision of the Court of Appeals below is a gross miscarriage of justice, and this Court in its supervisory powers should grant this petition,

WHEREFORE, the petitioner prays that a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit be granted in this case, and that upon a review of the record that the judgment in favor of the respondent be in all things reversed, and this cause be remanded for further proceedings in accordance with the orders of this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Filed May 8, 1958. Joseph W. Stewart, Clerk.

No. 14062

HELEN M. KIEFER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided May 8, 1958

Mr. Claude L. Dawson for appellant.

Mr. Robert S. Green, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Samuel D. Slade*, Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Paul A. Sweeney*, Attorney, Department of Justice, and *Lewis Carroll*, Assistant United States Attorney, also entered appearances for appellee.

Before BAZELON, WASHINGTON and DANAHER, Circuit Judges.

PER CURIAM: In a former appeal in this suit for benefits under a National Service Life Insurance policy, we held that the District Court erred in barring the United States from the defense of fraud on the ground that the

fraud was not relied upon in reinstating the deceased ex-serviceman's policy.[1] Because of this error, the District Court did not consider whether the false representations were made with knowledge of their falsity and with intent to deceive. We therefore remanded the case "to afford the parties an opportunity to litigate that issue . . . ."

Pursuant to the remand, a jury trial was had at which cross-motions for directed verdicts were filed at the conclusion of the evidence. The District Court granted the motion of the United States. We think the record fully supports this action.

Affirmed.

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[1] *United States* v. *Kiefer*, 97 U.S.App.D.C. 101, 228 F. 2d 448 (1955), *cert. denied*, 350 U.S. 933 (1956).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

April Term, 1958.

C. A. 170-54

No. 14,062

Helen M. Kiefer, Appellant,

v.

United States of America, Appellee.

Filed May 8, 1958. Joseph W. Stewart, Clerk.

APPEAL FROM the United States District Court for the District of Columbia.

Before: BAZELON, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court apealed from in this cause be, and the same is hereby, affirmed.

Dated: May 8, 1958.

Per Curiam.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 116, both inclusive, constitute a true copy of the joint appendix and portions of the record, designated by counsel for appellant, in the foregoing designation, in the case of:

Helen M. Kiefer, Appellant,

v.

United States of America, Appellee

No. 14,062, April Term, 1958, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this sixth day of June, A.D. 1958.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.